IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1425

NORTHERN HELEX COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioner, Northern Helex Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on October 22, 1975, and that the Court of Claims be directed to reconsider and decide this cause in compliance with its rules.

OPINION BELOW

The opinion of the Court of Claims, reported at 207 Ct.Cl. 862, 524 F.2d 707, together with the opinion and findings of fact of the Trial Judge, and the 1972 opinion of the Court of Claims, appear in the separate Appendix filed herewith.

JURISDICTION

The judgment of the Court of Claims was entered on October 22, 1975. A timely petition for rehearing *en banc* was denied on January 9, 1976, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether this judgment should be reversed and the cause remanded for a new decision in this exceptionally important and lead case involving the largest claim ever decided by the Court of Claims because it:

(a) disregarded its Rule 147(a) and departed from its 110-year procedure *by not adopting or making any findings of fact,* thereby failing to provide a discernible factual basis for its judgment; and

(b) summarily disregarded the Trial Judge's 277 Findings of Fact notwithstanding the presumed correctness of such findings under Rule 147(b).

2. Whether the Court of Claims committed gross error compelling reversal when the record incontrovertibly shows, and the Trial Judge found, that:

(a) none of the $43 million cost of contract performance can be saved and the helium must be extracted whether accepted by the Government or wasted into the atmosphere because the helium plant is inextricably integrated with other facilities in a manner known to and encouraged by the Government; and

(b) only judgment for the contract price will compensate petitioner for its actual direct damages and

result in the Government's receiving the helium vital to this Nation.

3. Whether the Court of Claims erred in failing to look to and apply the Uniform Commercial Code to establish the contract price as the measure of damages for the Government's breach of contract when the contractor exercised reasonable commercial judgment and continued to tender the product to the Government.

STATEMENT OF CASE

This is the first of several exceptionally large breach of contract cases arising out of the helium conservation program.[1] The United States, acting through the Department of Interior (Interior), entered into a helium purchase contract on August 15, 1961, with Northern Helex Company (Northern Helex or petitioner), a wholly-owned subsidiary of Northern Natural Gas Company (Northern) which provided that helium would be delivered and paid for during the period 1962 through 1983.

Interior entered into four helium purchase contracts pursuant to the Helium Act Amendments of 1960, 50 U.S.C. § 167 et seq., totaling approximately $950 million. The program and contracts were initiated because (1) helium is a unique and limited natural resource vital to fulfilling many of our energy, defense, space, industrial, and medical needs, and (2) helium contained in the natural gas being produced for fuel constitutes this Nation's largest helium re-

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[1] *See, e.g.*, Cities Service Helex, Inc. v. United States, Ct. Cl. Dkt. No. 128-75 (filed April 24, 1975), seeking $99 million; National Helium Corp. v. United States, Ct.Cl. Dkt. No. 158-75 (filed May 12, 1975), seeking $175 million.

serve and unless extracted and saved from the gas on the way to market, the helium is wasted into the atmosphere. It is uncontroverted that conservation of this helium is still clearly in the public interest (App. 306, 252-253).

Interior's contract with Northern Helex was preceded by extensive studies by both parties of Northern's gas stream and the manner in which helium could be extracted to their mutual benefit. A general comprehension of how a helium extraction plant provides the opportunity to extract other constituents from a natural gas stream is crucial to understanding why inextricable integration of petitioner's helium plant with other facilities was clearly foreseen by the Government and the result reached by the Court of Claims is clearly erroneous.

Liquefied petroleum gas (LPG) and ethane are combustible constituents of natural gas and their removal reduces the heating value of the remaining gas stream unless a commensurate quantity of helium and nitrogen, which are non-combustibles, is also removed. Inasmuch as the nitrogen content of Northern's stream was between 12% and 14% and the helium content was .4%, nitrogen was the predominant non-combustible to be removed. Helium and nitrogen are extracted by the same cryogenic process which, in stages, liquefies the other constituents of the gas stream leaving as a vapor a helium and nitrogen mixture which is then separated in the final stage. Thus, as a result of the nitrogen removal capability made available by a helium extraction plant, LPG and ethane are extracted for petrochemical operations and, at the same time, substantial economies are

achieved by integrating the processes and the physical facilities involved (App. 169-170, 221-222, 38).

Interior, which prior to the Helium Act Amendments had been the sole extractor and supplier of helium, recognized that the process for helium extraction would also enable Northern to remove nitrogen which then would permit extraction of LPG and ethane for petrochemical operations. The potential for integrating petrochemical operations with the helium plant and the dependency of the petrochemical operations on the continued operation of the helium plant were apparent to and discussed by Northern and Interior. Congress and Interior wanted private industry to participate in the conservation program and provide the capital to construct and operate the helium plants. The means expressly used by Interior to attract Northern and the other owners of rich helium-bearing natural gas into the helium conservation program were (1) a contract to purchase the helium for 20 years and (2) the opportunity to extract LPG and ethane for petrochemical operations through the nitrogen removal capability provided by a helium plant.

In accordance with the integration plans discussed and encouraged by Interior, petitioner constructed a helium plant which was inextricably integrated with LPG, ethane, and petrochemical operations.[2] The helium plant was intentionally designed and constructed to extract a nitrogen stream in the quantities needed by Northern to support its ethane and petrochemical operations. It is this need to remove nitrogen in

[2] The petrochemical facilities were the last to be constructed under the $300 million integration plan because they were dependent on the operation of the LPG and helium facilities.

order to permit the extraction of ethane for petrochemical operations that makes the integration inextricable. Northern Helex commenced its delivery of helium to Interior in December 1962.

The helium conservation program was intended to be self-supporting, financed with borrowing authority provided by Congress and with funds lent by the Treasury Department to Interior, which were to be repaid from helium sales proceeds. The Trial Judge found:

> "139. During 1969 the Bureau of the Budget ('BOB') (which in July 1970 became the Office of Management and Budget ('OMB')), selected the helium conservation program as one of the Federal programs which could be eliminated to save money. It was BOB's view that the helium conservation contracts were no longer necessary, and that, unless their budgetary impact could be substantially reduced, the program should be canceled." (App. 237)

The contracts, however, permitted termination only if certain specified conditions occurred which would make it clear that it would no longer be in the public interest to continue conservation of helium. Interior pointed out to BOB and OMB that those conditions did not exist. Nevertheless BOB, and later OMB, refused to seek adequate borrowing authority, and Interior was unable to continue paying for the helium delivered (App. 237-246). Northern Helex treated the failure of Interior to pay for the helium delivered in 1969 and 1970 as a material breach, ended the contract, and filed suit in the Court of Claims on December 24, 1970, to recover $92,304,000. On instructions from OMB, and contrary to his own view and that of his staff, Acting Secretary of the Interior

Russell sent out a notice dated January 26, 1971, purporting to terminate Northern Helex' contract, together with the contracts of the other three contractors under the termination clause in the contracts (App. 241-253).

On January 21, 1972, the Court of Claims, in a decision delivered by Judge Davis speaking for the unanimous 7-Judge Court, held that the Government's breach of Northern Helex' contract was material and had not been waived. The Court entered judgment on liability against the Government and remanded the case to the Trial Judge for a determination of the amount of damages. Northern Helex continued tendering helium to the Government after the contractual obligation to do so had been ended because as significantly determined by the Court in its 1972 decision:

> "* * * Plaintiff's helium extraction facilities are so interrelated with its liquefied petroleum gas and petrochemical operations that the helium facilities must be continued in operation whether helium is wasted or sold. * * *" (App. 305-306)

> "* * * plaintiff was fully warranted in following the course it chose. It exercised 'reasonable commercial judgment' in deciding to continue performance." (App. 310)

> "We are convinced of the fairness of following the modern U.C.C. rule in this case because of the harshness of a contrary result on our special facts, where cessation of production was commercialy impossible and avoidance of waste most desirable. * * *" (App. 311)

> "* * * Those circumstances were all indicated above as the reasons why, in this case, continuation of performance reasonably served to mitigate damages. Moreover, accurate record-keeping and measuring was essential to the identification of helium with the contract pursuant to U.C.C. § 2-704(2), one remedy afforded Northern Helex by the Code." (App. 312)

Included in the remand to the Trial Judge for a determination of the amount of damages was the effect thereon, if any, of the Government's affirmative defense relating to Under Secretary Russell's purported termination.

The major question before the Trial Judge in the extensive trial on the damage issue[3] was whether Northern Helex was entitled to recover the contract price for the balance of the contract period because it was unable to avoid any cost of performing the contract.[4] The parties stipulated that (with adjustments

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[3] Trial on the damage issues was concluded in April 1973 with a record consisting of the testimony of 19 witnesses at trial, 5 evidentiary depositions, and thousands of pages of exhibits. The Trial Judge filed his opinion and 277 numbered findings of fact with the Court on December 3, 1974. The Trial Judge, Louis Spector, is a seasoned trier of the facts as former member and Chairman of the Armed Services Board of Contract Appeals and Commissioner and Trial Judge at the Court of Claims, and especially qualified in Government contract matters.

[4] The authorities awarding the contract price as the measure of damages at common law are summarized by the Trial Judge (App. 146, 149-150). Northern Helex also relied on the Uniform Commercial Code because the Court in its 1972 unanimous decision had already ruled that it was applicable and the Code reached the same result of awarding Northern Helex the contract price and the Government the helium.

immaterial here) $43,067,413 represents "cost of performance"—that is, the cost of continuing operations of the helium plant from December 24, 1970, to the end of the contract period in August 1983. The parties agreed and the Trial Judge and the Court of Claims all recognized that:

> "The basic rule for awarding common law damages for a breach of contract is stated as follows in RESTATEMENT OF LAW, CONTRACTS § 329, comment a at 504:
>
> > "In awarding compensatory damages, the effort is made to put the injured party in as good a position as that in which he would have been put by full performance of the contract, at the least cost to the defendant and without charging him with harms that he had no sufficient reason to foresee when he made the contract. * * *"

And at section 335 [id.]:

> "If the defendant's breach of contract saves expense to the plaintiff by discharging his duty of rendering a performance in return or by excusing him from the performance of a condition precedent, the amount of this saving is deducted from the damages that would otherwise be recoverable." (App. 11)

The record showed, and the Government acknowledged, that integration of the helium plant with ethane and petrochemical operations precluded saving any cost

of performance.[5] Thus, the basic factual issue for decision was whether the Government had sufficient reason to foresee that integration.

The Trial Judge, citing numerous findings, concluded:

> "In accordance with the basic rule, plaintiff claims entitlement to the full contract price because it cannot avoid any costs of performance. Its helium facilities are in fact fully and inextricably linked with LPG, ethane and petrochemical facilities, and must continue in operation whether the helium is taken by defendant or vented into the atmosphere. This integration was contemplated by the parties as the most practical method of implementing their respective plans. It was encouraged by defendant for the mutual benefit of the parties and it was expressed in a contract provision.
>
> * * * *
>
> "* * * Capital investment in the system exceeds $300 million. These integration plans, discussed, endorsed and encouraged by defendant's representatives in their negotiations with Northern, were major criteria in Northern's decision to participate in the conservation program. * * * It is clear that plaintiff cannot avoid any costs of performance, and that it is entitled to the contract price." (App. 147)

The Trial Judge found the contract price, with adjustments, was $78,012,142, and he recommended entry of judgment for this amount.

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[5] A fuel cost savings of $11,000 a year could be achieved only with a capital expenditure for modification of the plant and other costs in excess of the total fuel cost savings.

On October 22, 1975, the Court of Claims held that the $43 million of unavoidable cost of performance was not recoverable and entered judgment for petitioner only for its anticipated profits.[6]

It is impossible to discern the legal or factual basis for the Court's holding. It seemed to recognize that the pre-contract discussions prove that the Government knew about and encouraged the very type of integration achieved by Northern. The Court also seemed to recognize that the helium plant must continue in operation because of that integration. The Court nevertheless ignored these two factors and, rather than awarding the full contract price as damages, proceeded into an irrelevant and confusing discussion of specious points and non-sequitors without addressing and answering the contentions actually made. Incredible as it may seem, the Court concluded—without any factual basis whatever—"that the Government could not possibly have foreseen these activities" and, therefore, was not liable for the unavoidable cost of continued operation of the helium plant.

The findings of fact made by the Trial Judge could not support the conclusions reached by the Court. Without any discussion of his findings or explanation for doing so, the Court violated its Rule 147(b), under which the Trial Judge's findings of fact are presumed correct and disregarded the Trial Judge's 277 findings in their entirety. Indeed, because the record did not support its conclusions, the Court made no findings of fact at all, notwithstanding its Rule 147(a), which requires the Court to find the

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[6] Because of some possible deductions suggested by the Court, the case was remanded to the Trial Judge to determine the precise amount of the judgment.

facts and state separately its conclusion of law in all cases tried on the facts.

The Court stated that the facts necessary to the decision are contained in the opinion. They are not. Instead, for its introductory statement on the amount of damages, the Court copied essentially verbatim the introductory statement in the 1972 decision on liability. These facts relate to the issue of liability and are irrelevant to the damage issue. Indeed, they were not even updated to comport with or reflect the determinations made in the 1972 decision or the facts proved in the trial.[7]

Judge Nichols dissented. On the basis of the Uniform Commercial Code and the common law rules, he would have allowed recovery of the $43 million unavoidable cost of performance: "The record herein shows without contradiction that the Government always foresaw * * * that plaintiff would integrate * * *." (App. 38)

The Court denied rehearing on January 9, 1976.

REASONS FOR GRANTING THE WRIT

I

THE FAILURE OF THE COURT OF CLAIMS TO COMPLY WITH ITS RULE 147 VIOLATES A FUNDAMENTAL SAFEGUARD AGAINST DECISIONS BEING MADE ARBITRARILY AND REQUIRES THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

Rule 147(a) of the Rules of the Court of Claims, 28 U.S.C. Rules, provides:

[7] This October 22, 1975, decision on which review is sought was rendered by a 5-Judge Court, with one concurring opinion and one dissenting opinion. Judge Davis, who authored the earlier 7-Judge unanimous decision on liability, did not participate in the decision on damages.

> "* * * In all actions tried on the facts, the Court will find the facts and state separately its conclusion of law, and will enter an appropriate judgment. * * *"

Rule 147(b) provides that "the findings of fact made by the trial judge shall be presumed to be correct".

The Court of Claims violated both of these provisions (1) by disregarding the Trial Judge's 277 findings of fact "without respect to the presumption of correctness demanded by Rule 147(b)" (dissenting opinion) (App. 40), (2) by failing to indicate which findings it determined were not supported by the record, and (3) by failing to make its own specific fact findings as required by Rule 147(a). From its inception until the instant case, the Court of Claims has made separate findings of fact in all cases tried on the facts. The Court's departure in this case calls for corrective action by this Court.

A. The Court of Claims Should Not Be Permitted To Dispense with Findings of Fact in Cases Tried on the Facts.

This Court is responsible for overseeing compliance by lower federal courts with the rules established to govern their practice and procedure.[8]

This Court has indicated that where a lower federal court has disregarded one of the rules governing its procedure, and there is a likelihood of recurring error that will be forestalled by immediately confronting the challenged practice, mandamus is an ap-

[8] See *Northcross* v. *Board of Education for The Memphis City Schools*, 412 U.S. 427, 429 (1974); *Taylor* v. *McKeithen*, 407 U.S. 191 (1972); *Southern Construction Company* v. *United States*, 371 U.S. 57, 60 (1962); *Duke Power Company* v. *Greenwood County*, 299 U.S. 259 (1936).

propriate remedy. In *McCullough* v. *Cosgrave,* 309 U.S. 634 (1940) (*per curiam*), this Court issued a mandamus upon finding that the District Court violated Rule 53(b), F.R.Civ.P., and directed the District Court to vacate its order and proceed in accordance with the rules governing its procedure. See also *La Buy* v. *Howes Leather Co.,* 352 U.S. 249, 260 (1957), wherein its supervisory control over "the exercise of its judicial administration in the federal system", this Court affirmed the issuance of a writ of mandamus to a District Court which failed to adhere to the requirements of Rule 53(b), F.R.Civ.P.

Mandamus is proper to review an issue of first impression involving a basic and undecided rules problem. *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964) (involving Rule 35, F.R.Civ.P.); see also *United States* v. *United States District Court,* 444 F.2d 651, 656 (6th Cir. 1971), aff'd 407 U.S. 297, 301, n. 3 (1972); *United States* v. *Dooling,* 406 F.2d 192, 198-199 (2d Cir.) *cert. denied,* 395 U.S. 911 (1969). In *Will* v. *United States,* 389 U.S. 90, 107 (1967), the Court noted that "* * * mandamus will lie in appropriate cases to correct willful disobedience of the rules laid down by this Court * * *". See generally, note, 86 Harv.L.Rev. 595 (1973).

The departure of the Court of Claims from its 110-year procedure and violation of its Rule 147 is inexplicable (App. 40). The Court of Claims has embarked upon what will undoubtedly prove to be a dangerous course for all litigants in that Court by failing to set forth the factual basis for its decision. The instant case is more than just the single largest case ever decided by the Court of Claims; it is the lead case in several breach of helium contract cases pending in that Court

that have common factual issues. This Court should vacate the judgment of the Court of Claims, remand the case to that Court, and direct the Court to comply with its rules. Petitioner does not seek a writ of mandamus in this case only because the trial proceedings are completed, or essentially so, and, therefore, relief is available by writ of certiorari.

The United States is always the defendant in the Court of Claims. There could be no doubt about the importance of the Court of Claims' complying with its Rule 147 if we *assumed arguendo* that the findings of fact of the Trial Judge showed Northern Helex to be entitled to only its anticipated profits, the Court of Claims disregarded his findings, made none of its own, and entered judgment for Northern Helex for $80 million. *Compare United States* v. *Penn Foundry & Manufacturing Co., Inc.,* 337 U.S. 198 (1949). A claimant against the United States, of course, is entitled to the same judicial procedures and consideration as the United States. The failure of the Court of Claims to make factual findings to support its ultimate conclusions requires reversal and remand.

Congress has bestowed upon the Court of Claims exclusive jurisdiction over most claims against the Government in excess of $10,000. These cases are frequently large and complex. The only review of these decisions on the facts or the law is in this Court by writ of certiorari. The availability of only this single, discretionary review highlights the need for the Court of Claims to adhere to its rules and make findings of fact. For many year the statutes expressly required the Court itself to make findings of fact (24 Stat. 505

(§7) (1887); 28 U.S.C. (1946 ed.) §§ 288 and 764).[9] The statute now requires the Commissioners (Trial Judges) of the Court of Claims to make findings of fact and indicates that the Court's opinion will be accompanied with findings of fact (28 U.S.C. § 2503). The Court of Claims may adopt, reject or modify the Trial Judge's findings of fact, but it cannot dispense with the findings of fact in their entirety as it did in this case. The Court of Claims itself cogently stated in *Miller* v. *United States,* 168 Ct.Cl. 498, 501, 339 F.2d 661, 662 (1964):

> "* * * Under our rules the findings of our commissioner are *prima facie* correct and they are adopted by the court in the absence of exceptions thereto. However, the law casts the ultimate burden of making findings on the judges of the court, and wherever we are convinced that the weight of the testimony is contrary to the finding of the commissioner, it is our duty to substitute for the commissioner's finding what we consider to be the correct finding. * * *"

[9] The Act of March 3, 1887, c. 359, 24 Stat. 505, providing for suits against the United States, in § 7 specifically required findings of fact by the Court of Claims and district courts. This requirement was carried into § 764 of the 1926 codification of Title 28 and was made applicable to the Court of Claims and district courts by 28 U.S.C. § 761 (1926 ed.). In the 1948 revision of Title 28, the table of distribution shows § 761 as incorporated in 28 U.S.C. §§ 2071, 2072 (1 U.S. Code Cong. & Admin. News 1948, p. A194). Section 7 of the Act of March 3, 1887, 28 U.S.C. § 764 (1940 ed.) was repealed, according to the Reviser's Notes, because the requirement was "Covered by Rules 52 and 75 of the Federal Rules of Civil Procedure". H. Rep. No. 308, 80th Cong., 1st Sess. (1947), A239. The failure to reference the Court of Claims rule requiring findings of fact in the repeal of § 764 was an apparent oversight and, in any event, there is no indication of an intention to change the existing fact finding rules and practice in the Court which has exclusive jurisdiction in the largest cases.

With the trend being toward more complex and larger claims against the Government, now is not the time to dispense with findings of fact.

This Court has emphasized on several occasions the importance of these rules of the Court of Claims and, as the only Court with jurisdiction to do so, has stood watch over their observance. In *United States* v. *Penn Foundry & Manufacturing Co., supra,* this Court held that findings of fact of the Court of Claims were insufficient to sustain the Court's award of damages to a contractor following the Navy's cancellation of a contract. Although the Court of Claims made findings of fact in *Penn Foundry,* it did not make a specific finding that the contractor was ready and capable of performing the contractual obligation upon which its profits were contingent. Indeed, there existed findings which precluded the drawing of any inference of such readiness and capacity to perform.

A similarly confused result occurred in the instant case. The Trial Judge made no less than ten separate findings that integration of petitioner's helium extraction facilities with other liquid and gas extraction processes was foreseeable, and, in fact, encouraged by the Government. These findings are presumed to be correct. The Court of Claims did not point to even a shred of evidence contrary to these findings. Nor did it point to any facts that demonstrated a lack of foreseeability by Interior of the integration of these facilities.

In *United States* v. *Causby,* 328 U.S. 256 (1946), the Court of Claims held that low altitude Army and Navy aircraft flights over private farmland constituted the taking of a permanent easement. This Court

reversed the judgment and remanded the case to the Court of Claims to make the necessary findings as required by its rules. Specifically, this Court could not discern any finding to support the Court of Claims conclusion that the easement taken was permanent. This Court stated:

> "* * * It is true that the Court of Claims stated in its opinion that the easement taken was permanent. But the deficiency in findings cannot be rectified by statements in the opinion. * * *" (328 U.S. at 267)

Here, like in *Causby,* the ultimate ruling that integration of petitioner's operations was not foreseeable is "* * * more like conjecture rather than a conclusion from evidence * * *." (328 U.S. at 268) "When the Court of Claims fails to make findings on a material issue, it is proper to remand the case for such findings." *Seminole Nation* v. *United States,* 316 U.S. 286, 300 (1942).

Findings of fact are required in all actions tried on the facts in the United States District Courts (F.R. Civ.P. 52(a)).[10] Ultimate factual conclusions stated in the opinion without supporting subsidiary findings of fact do not comply with Rule 52(a), and constitute

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[10] In *Schneiderman* v. *United States,* 320 U.S. 118, 129-131 (1943), the Court noted:

> "* * * The pertinent findings of fact on these points, set forth in the margin, are but the most general conclusions of ultimate fact. It is impossible to tell from them upon what underlying facts the court relied, and whether proper statutory standards were observed. If it were not rendered unnecessary by the broad view we take of this case, we would be inclined to reverse and remand to the district court for the purpose of making adequate findings."

reversal error. *Interstate Circuit, Inc.* v. *United States,* 304 U.S. 55 (1938); *Mayo* v. *Lakeland Highlands Canning Co., Inc.,* 309 U.S. 310 (1940); *Kelley* v. *Everglades Drainage District,* 319 U.S. 415, 420 (1943). Supporting findings of fact similarly are required under Rule 147. *United States* v. *Penn Foundry & Manufacturing Co., supra.* Contrary to the statement at the outset of the Court of Claims' opinion, the facts necessary to the decision are not stated in the opinion. Instead of making subsidiary factual determinations in this opinion to support its ultimate conclusions, the Court intermingled assumptions with allegations and contentions making it impossible to discern the basis for its ultimate determinations.

Findings of facts are a judicial safeguard against careless factual determinations. *United States* v. *Forness,* 125 F.2d 928, 942 (2d Cir. 1942); see also 2B Barron & Holtzoff, Federal Practice and Procedures (Wright ed. 1961), §1121, pp. 481-482; Notes of Advisory Committee on 1946 Amendment to Rule 52(a), F.R.Civ.P.; 5A *Moore's Federal Practice,* 52.06[1], p. 2706. In *The Snake Or Piute Indians* v. *United States,* 125 Ct.Cl. 241, 249-250 (1953), the Court of Claims reviewed the extensive authorities on the need for findings of fact and, quoting from *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 96 F.2d 554, 559 (D.C. Cir.), *cert. denied,* 305 U.S. 613 (1938), recognized:

> "The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose * * *

of apprising the parties and the reviewing tribunal of the factual basis of the action. * * *

The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. * * * " (Emphasis added.)

The integrity of the judicial system requires that the Court of Claims should not be permitted to dispense with such an important judicial procedure as findings of fact.

B. The Court of Claims Should Not Be Permitted To Summarily Disregard the Findings of Fact Made by Its Trial Judges.

In breach of contract cases heard under 28 U.S.C. § 1491, the Court of Claims, like the District Courts, sits as a court of original jurisdiction. Court of Claims Rule 147(b) is similar to F.R.Civ.P. 52(a) and 53(e)(2). Under the Federal Rules, the District Court must accept the findings of fact of the Master unless clearly erroneous, and the appellate courts must accept the findings of fact of the District Court unless clearly erroneous. Under Court of Claims Rule 147(b), the findings of fact made by the Trial Judges are presumed to be correct, which is essentially the same as Rule 52(a). See *Elmers* v. *United States,* 172 Ct.Cl. 226, 232 (1965) (using the "clearly erroneous" standard of review). In *Bonnar* v. *United States,* 194 Ct.Cl. 103, 146-147, 438 F.2d 540, 563 (1971), the Court of Claims emphasized the importance of Rule 147(b) and defined the burden necessary to overcome the presumption:

"In this, as in all cases in which a Commissioner has carefully weighed conflicting evidence,

the burden of sustaining exceptions to the findings is far from slight. We start with the double directive that due regard must be given to the Commissioner's opportunity to judge the credibility of the witnesses and that his factual findings 'will be presumed to be correct.' Rule 48 [now Rule 147(b)]. That presumption is dissipated only by a strong affirmative showing. * * *" (Citing *Davis* v. *United States,* 164 Ct.Cl. 612, 616-617 (1964).)

Regardless of whether the Trial Judges of the Court of Claims are viewed as comparable to Masters or District Court Judges, they are the triers of the facts, and their findings of fact should not be summarily set aside. F.R.Civ.P. 53(e)(2); *Tilghman* v. *Proctor,* 125 U.S. 126 (1888); *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 689 (1946); *United States* v. *Merz,* 376 U.S. 192, 198 (1964); *United States* v. *Marine Bancorporation, Inc.,* 418 U.S. 602, 615, n. 13 (1974).

In reviewing a Master's findings or those of a Trial Judge, the question for the reviewing court is whether "* * * on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed". *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969); *Commissioner* v. *Duberstein,* 363 U.S. 278, 289, 291 (1960); *United States* v. *United States Gypsum Co.,* 333 U.S. 364 (1948). In the instant case, the Court of Claims opinion does not review the record in whole or in part, or show where it considered the Trial Judge to have erred. The opinion in no way connects the evidentiary facts to the Court's factual assumptions and conclusions. As the dissent stated:

> "* * * Our trier of fact drew his inferences, and we are rejecting them, I believe, without respect for the presumption of correctness demanded by Rule 147(b). It seems to me that the implication of this rule is that we do not disregard numbered findings, but if we think the record does not support them, we take them up individually and show why. * * *" (App. 40)

C. This Case Presents a Clear Illustration of Why the Court of Claims Must Be Required To Continue Making Findings of Fact and Be Precluded from Summarily Rejecting Its Trial Judges' Findings of Fact.

The instant case, involving damages in the amount of approximately $80 million, represents the largest case the Court of Claims has ever had before it for decision. The Trial Judge's 277 findings of fact and opinion are thorough and accurately reflect the record. On the unavoidable cost issue, the case calls for the application of elementary legal principles to clear facts. Yet the Court for inexplicable reasons disregarded its Trial Judge's findings of fact, made none of its own, ignored its own 1972 factual determinations, and based its decision on factual assumptions having no basis in the record.

Following the trial on damages, the Trial Judge concluded that the inextricable integration of the helium plant:

> "* * * was contemplated by the parties as the most practical method of implementing their respective plans. It was encouraged by defendant for the mutual benefit of the parties and it was expressed in a contract provision."

In support, he cited his findings 14 through 19, 30, 31, 35 through 40, 70, 72 through 75, 78 through 80, 85 through 90, and 95 through 97 (App. 147).

Findings 14 through 19, in essence, describe (1) why Northern's gas stream could be fully utilized by integrating the processes and facilities for helium extraction, nitrogen removal, LPG and ethane extraction and petrochemical operations, and (2) why that integration was dependent upon the operation of the helium extraction plant because it, and it alone, provided the inert removal (helium and nitrogen) capability which permitted the extraction of the quantities of LPG and ethane needed for petrochemical operations (App. 169-170).

The balance of the cited findings summarize or quote from *Government* documents prepared prior to or contemporaneously with the negotiation of this contract and compel the conclusion reached by the Trial Judge. Specifically, the Trial Judge found that:

1. The chief Government negotiator of this contract, Mr. Wheeler, stated in a memorandum prior to execution of the contract that:

> "* * * Northern proposed a plan whereby the company would build and operate a petrochemical plant and extract helium and nitrogen, processing thereby about a billion cubic feet of natural gas a day. * * * Mr. Wheeler * * * considered the plan to have several advantages. * * * it would fit into the overall operations of Northern. Furthermore, as Mr. Wheeler noted for the Government in an internal memorandum of the conference, '[i]t would avoid the necessity for the Government to undertake nitrogen removal and possibly petrochemical operations as a necessary, but basically unrelated, adjunct to helium conservation.'" (Finding 26, App. 174-175)

2. In the data used for solicitation of proposals, Interior expressly called to the attention of pros-

pective contractors the integration opportunities, including nitrogen removal and ethane extraction for petrochemical processing (Finding 30, App. 175-176).

3. In an internal memorandum one and one-half years prior to execution of the contract, the Government's chief negotiator—

> "* * * noted that it was anticipated that private industry would integrate its helium and other operations to permit extraction of ethane and other hydrocarbons, and removal of nitrogen to upgrade the residue gas heating value." (Finding 40, App. 179)

4. Six months prior to the execution of the contract, the Director of the Bureau of Mines informed the Under Secretary of Interior that:

> "* * * some of the private participants 'would integrate helium extraction with nitrogen removal, ethane extraction, and other operations not independently feasible,' thus aiding the national economy and better utilizing the ingredients in the natural gas." (Finding 75, App. 206)

5. During contract negotiations, Northern advised Interior that it—

> "* * * was then in the process of building an LPG plant at Bushton and therefore would be able to offer a multipurpose plant which would extract helium, liquids and nitrogen, thus permitting a price advantage to Interior. * * * that the Bushton plant then being constructed was a liquids recovery plant, that the helium extraction plant would be fully integrated with it, and that petrochemical facilities might be constructed and added in the future. * * * Mr. Wheeler sent a memo to the members of Interior's negotiating board discussing a draft of the contract. In that memo he recognized that the helium extraction facilities would, in most cases, be fully integrated with other facilities of the contractor." (Finding 79, App. 207-208)

6. As the Government's chief negotiator testified:

> "In the course of negotiations, the Government not only contemplated that integrated facilities would be used but, * * * 'deliberately made it possible' through paragraph 31.3 of the contract * * *." (Finding 95, App. 214)

7. Integration was considered by Interior's General Manager for Helium Operations to be—

> "* * * the principal area for private helium contractors to find economic incentive to enter into the helium contracts, and it would also permit a lower price to Interior * * *." (Finding 96, App. 214-215)

Incredibly, the Court completely ignored these uncontrovertible facts in deciding whether Interior had sufficient reason to foresee the inextricable integration of the helium plant with LPG, ethane, and petrochemical operations.

These detailed and elaborate findings of fact, which under Rule 147(b) are "presumed to be correct", were disregarded by the Court in favor of the sweeping conclusion—totally bereft of analysis or documentation—that "the Government could not possibly have foreseen these activities * * *." The Court thereupon disallowed $43 million of unavoidable damages to petitioner on the factual assumption that the Government could not have foreseen the very type of integration which the Government contemplated and expressly represented was available if petitioner con-

tracted wth the Government. There is no evidence whatsoever in the record to support the Court's conclusion that the Government did not contemplate or have sufficient reason to foresee the type of integration achieved by Northern. Judge Nichols correctly points out in his dissent:

> "The record herein shows without contradiction that the Government always foresaw * * * that plaintiff would integrate * * *." (App. 38)

II

THE DECISION OF THE COURT OF CLAIMS ON DAMAGES IS SO PATENTLY ERRONEOUS THAT THE JUDGMENT SHOULD BE VACATED AND THE CASE REMANDED FOR A NEW DECISION.

The Court of Claims decision in this case is not only wrong—it has no basis in the record and is obviously injurious to both the Government and petitioner. *Gibson* v. *Lockheed Aircraft Service, Inc.*, 350 U.S. 356, 357 (1956) (Frankfurter, J., concurring); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 246-247 (1957).

It is clear that the helium must be extracted at a cost of $43 million because the helium plant is integrated with other facilities. It is also clear that the helium has a substantial value in the hands of the Government because, *inter alia*, it can control the use and price of helium, 50 U.S.C. §§ 167(c) and (d). It is incontrovertible that the helium being extracted by petitioner should be conserved by the Government because the reserves are limited and it is vital to fulfilling many of this Nation's energy, defense, space, industrial, and medical needs.

In its 1972 decision, the Court of Claims correctly determined that Northern Helex' tendering the helium to Interior before as well as after the contract was ended was the exercise of reasonable commercial judgment, mitigated damages, and conserved a vital national resource (*supra*, pp. 7-8). These determinations, which were the law of the case, were ignored by the Court and contrary conclusions summarily and erroneously reached in its 1975 decision.

The basis of the Court's disallowance of the $43 million unavoidable cost of performance was the arbitrary assumption that the Government did not have sufficient reason to foresee the integration.

The Court failed to comprehend that it was immaterial whether Northern integrated the helium, LPG, ethane, and petrochemical operations within its own corporate structure or used separate corporations and intercompany contracts. These separate corporate entities and intercompany contracts neither increased nor decreased the Government's liability for its breach of contract. Nor do they alter one iota the controlling factual inquiry.

If the corporations are viewed as one, the liability of the Government for the unavoidable cost of operating the helium plant would be controlled by whether the Government had reason to foresee the inextricable integration of the helium plant with other facilities. If the corporations are viewed as separate corporations, the liability of the Government for the unavoidable cost of operating the helium plant would be controlled by precisely the same inquiry—whether the Government had sufficient reason to foresee the inextricable integration of the helium plant with other facilities. The

intercompany legal relationships are irrelevant, except for the Northern Helex contract with Northern which simply reflects the contemplated inextricable integration. Northern Helex contractually obligated itself to Northern to operate the helium plant through July 1983 to extract helium from Northern's gas stream (which by design of the plant necessarily extracted the nitrogen in a separate stream for Northern) in exchange for Northern's agreeing to supply petitioner the helium-bearing natural gas required to perform its contract with Interior. This contract was expressly referred to in the Interior contract.[11]

Illustrative of how far off of the judicial path the Court of Claims was in this case is its self-contradictory conclusion. Inasmuch as Northern Helex can save no

[11] The Court seems to have recognized that Northern Helex must continue to remove the helium (which by plant design removes the nitrogen) from Northern's gas stream (App. 7, 19). Nevertheless, the $43 million *which must be incurred and paid by Northern Helex* to operate the helium plant are referred to by the Court as "integrated costs", and Article 31.3 of the contract is construed as an exoneration clause to deny their recovery as damages on the theory they are costs of extracting products other than helium (App. 10). That article provides: "In connection with Seller's plant, Seller at its sole risk, cost and option may construct and operate, or cause to be constructed and operated, facilities for extracting products other than helium from the natural gas processed through said helium plant." The language of this article, the intention of the parties found by the Trial Judge, and the rules of construction with regard to other clauses and exculpatory clauses are contrary to the Court's interpretation. There is not an iota of evidence supporting such an interpretation. Article 31.3 was included in the contract to expressly permit the helium plant to be integrated with other facilities. Included in that article is also the normal contract language placing the risks and expense of constructing and operating the other facilities on the owners as Article 4.1 does with respect to the helium plant and Article 4.2 does with respect to Interior's pipeline (App. 148-149).

cost of performance, it is obvious that only the contract price will compensate Northern Helex and place it in the same monetary position it would have been in had the contract been fully performed. The Court deducted from the contract price the $43 million unavoidable cost of continued operation, along with a number of other erroneous deductions, and still concluded: "The resulting figure, discounted to current value as of the date of entry of final judgment, should place the plaintiff in as good a position as it would have been in had the contract been fully performed." (App. 28) As Judge Nichols aptly pointed out in his dissent:

> "The court puts on its blinders so as to be able to say it is putting the plaintiff in as good a position as it would have been in upon full performance, the standard it gives lip service to and should follow in reality. * * *" (App. 38)[12]

Such a level of judicial action requires this Court to exercise its supervisory powers and reverse the Court

[12] Illustrative of the many errors made by the Court on other issues are the deductions from anticipated profit for so-called "excess" values of the helium plant proposed by the Court *sua sponte* (App. 27-28). The deduction proposed for the physical plant is contrary to the express terms of the contract. In the event the value of the helium plant was in excess of the depreciated costs, such value was to be ignored if there had been a *valid* termination by the Government. *A fortiorari*, such value is to be ignored when the Government breaches the contract. The helium plant has a value as an on-going operation only *upon expending the $43 million cost of operations* which the Court refused to recognize as recoverable damages. Giving the Government a further deduction based on the benefits flowing from incurring this $43 million is preposterous.

of Claims and direct it to proceed in accordance with its Rule 147.[13]

III

THE COURT OF CLAIMS ERRED IN FAILING TO LOOK TO AND APPLY THE UNIFORM COMMERCIAL CODE TO ESTABLISH THE CONTRACT PRICE AS THE MEASURE OF DAMAGES FOR THE GOVERNMENT'S BREACH OF CONTRACT WHEN THE CONTRACTOR EXERCISED REASONABLE COMMERCIAL JUDGMENT AND CONTINUED TO TENDER THE PRODUCT TO THE GOVERNMENT.

Petitioner is entitled to recover the contract price as damages under Uniform Commercial Code §§ 2-703, 2-704, and 2-709. Sections 2-703 and 2-704 of the Code permit a seller injured by a buyer's breach of contract, in the exercise of reasonable commercial judgment, to continue performance and identify the goods to the contract. In its 1972 decision, the Court of Claims considered the applicability of § 2-704 and specifically found:

> "* * * in our judgment, plaintiff was fully warranted in following the course it chose. It exercised 'reasonable commercial judgment' in deciding to continue performance." (App. 310)

[13] No purpose would be served in delaying review by this Court of the procedurally defective judgment of the Court of Claims pending further proceedings before the Trial Judge to determine the precise amount of damages under that judgment. Indeed, harm would be caused petitioner and the other contractors whose cases are proceeding in the Court of Claims. Further, as a practical matter, until the damage issue is settled with certainty, much of the helium being extracted by the contractors will continue to be wasted when it clearly should be saved. The October 22, 1975, judgment is ripe for review by this Court. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964); *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); compare *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

The Court explained in the 1972 decision that continued delivery was the only practical course of action and held that § 2-704 was "* * * one remedy afforded Northern Helex by the Code." (App. 312)

The essential purpose of compensatory damages under the Code, as under general contract principles, is to put the injured party in as good a position as he would have been had the contract been fully performed (U.C.C. § 1-106). The major difference in this case between the Code and the common law rules is that under the Code it is unnecessary to show that the defendant had reason to foresee that the cost of performance was unavoidable. The exercise of reasonable commercial judgment is the controlling criterion for the contract price being the measure of damages under §§ 2-704 and 2-709 of the Code.

Having continued to extract and tender helium to the United States, as authorized by § 2-704, petitioner is entitled under § 2-709(1)(b) to the contract price for goods identified to the contract. Hawkland, *A Transactional Guide To The U.C.C.*, Vol. 1, p. 288 (1964). *Northern Helex Company* v. *United States*, 197 Ct.Cl. 118, 455 F.2d 546 (1972) (App. 299).

The only change in circumstances between the 1972 Court of Claims decision and its 1975 decision was that Interior refused to continue to accept the helium for storage. Article 2.1 of petitioner's contract provides that "* * * the United States agrees to pay for, *whether taken or not*, all of the helium-gas mixture produced in Seller's plant * * *" (App. 147). Notwithstanding this provision, petitioner paid Interior about a half-million dollars in storage charges and filed two motions to compel Interior to mitigate damages and store the helium on a no-prejudice basis in the only storage reser-

voir available. In denying the second motion, the Court stated:

> "On the other hand, plaintiff's interest, to the extent it prevails with respect to damages and recovers a monetary judgment, will be fully protected by the judgment, and will not be harmed by the failure of the defendant to continue to receive and store the helium." (App. 317)

Interior refused to store helium extracted after September 28, 1972, except on confiscatory terms (App. 266).

It is apparent that petitioner has taken reasonable steps to see that the Government received the product of performance. The choice of the Government in September 1972 to waste the helium thereafter extracted does not deprive petitioner of its right to the contract price under §§ 2-704 and 2-709 of the Code. Nevertheless, the Court of Claims, in its 1975 decision, refused to look to and apply these provisions of the Code.

The Uniform Commercial Code is a proper source of law to be applied in this case. In a landmark decision, *United States* v. *Wegematic Co.,* 360 F.2d 674 (2d Cir. 1966), the Second Circuit concluded that federal courts should look to the Code "as a source for the 'federal' law of sales". Judge Friendly stated:

> "The Code * * * is thus well on its way to becoming a truly national law of commerce * * *. When the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be a distinct disservice to insist on a different one for the segment of commerce, important, but still small in relation to the total, consisting of transactions with the United States." 360 F.2d, *supra,* at 676.

Chief Justice Traynor has observed:

> "The Uniform Commercial Code has become a major influence on the development of common law in the federal courts to govern cases involving government contracts and other commercial transactions." Traynor, "Statutes Revolving in Common-Law Orbits", 17 Cath. U.L. Rev. 401, 422-423 (1968).

The Court of Claims itself has explicitly looked to the Code as a "fair and just" source of federal common law, *Everett Plywood and Door Corp.* v. *United States,* 190 Ct.Cl. 80, 419 F.2d 425, 429 (1969), as have numerous other Federal courts.[15] Indeed, in its decision on the liability issue in this case, the Court of Claims in its 1972 decision utilized the principles set forth in the Code (App. 308-314). The Court of Claims has consistently adhered to this view except for its unexplainable departure from its own precedent and the law of the case in the instant proceeding.[16]

Federal boards of contract appeals have similarly acknowledged the relevance and authority of Code principles in Government contracts disputes "as re-

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[15] *See, e.g., Gardiner Mfg. Co.* v. *United States,* 479 F.2d 39, 41 (9th Cir. 1973); *In Re King-Porter Co.,* 446 F.2d 722, 732 (5th Cir. 1971); *United States* v. *Hext,* 444 F.2d 804, 810-811 and n. 19 (5th Cir. 1971); *Grain Merchants* v. *Union B. & S. Co.,* 408 F.2d 209, 218 (7th Cir. 1969); *In Re Yale Express Systems, Inc.,* 370 F.2d 433 (2d Cir. 1966); *United States* v. *Cloverleaf Cold Storage Co.,* 286 F.Supp. 680, 682 (N.D. Iowa 1968); *In Re Portland Newspaper Publ. Co.,* 271 F.Supp. 395, 400 (D. Ore. 1967).

[16] *Keydata Corp.* v. *United States,* 205 Ct.Cl. 467, 504 F.2d 1115, 1123-1124 (1974); *John C. Kohler Co.* v. *United States,* 204 Ct.Cl. 777, 498 F.2d 1360, 1367, n. 6 (1974); *George S. Groves* v. *United States,* 202 Ct.Cl. 660 (1973).

flecting the best in modern decision and discussion".[17] Finally, the Government itself frequently has urged the application of Code provisions in Federal contract disputes. See *Reeves Soundcraft Corp., supra; United States* v. *National Optical Stores Co.,* 407 F.2d 759, 761, n. 3 (7th Cir. 1969); Brief filed in Opposition to Certiorari in *Federal Electric Corp.* v. *United States,* Dkt. No. 73-1757, *cert. denied* —— U.S. —— (1975).

The Court of Claims decided the liability issue in this case with specific reference to the remedy sections of the Code, stating that "a remedy for the seller, when the buyer breaches, already exists under the law (U.C.C. §§ 2-703, 2-704)" (App. 309). Thus, reference to the Code for determination of a seller's remedies for a buyer's breach of contract was the law of this case, and petitioner should have been able to rely on the Court of Claims' use of the Code in later proceedings in this case.[18]

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[17] *Reeves Soundcraft Corp.,* ASBCA Nos. 9030 and 9130, 1964 B.C.A. ¶ 4317 at 20,877, citing *Padbloc Co., Inc.* v. *United States,* 161 Ct. Cl. 369 (1963); see also *Kain Cattle Co.,* ASBCA No. 17124, 73-1 B.C.A. ¶ 9,999 at 46,921; *Catalytic Eng'r & Mfg. Corp.,* ASBCA No. 15257, 72-1 B.C.A. ¶ 9,342 at 43,366; *Cross Aero Corp.,* ASBCA No. 14801, 71-2 B.C.A. ¶ 9,075 at 42,087; *Council Mfg. Co.,* ASBCA No. 14232, 71-1 B.C.A. ¶ 8,731 at 40, 549-50; *General Elec. Co.,* IBCA No. 451-8-64, 66-1 B.C.A. ¶ 5,507 at 25,791-93; *Productions Unlimited, Inc.,* VACAB No. 541, 66-1 B.C.A. ¶ 5,444 at 25,515; *Carpenter Steel Co.,* AECBCA No. 5-65, 65-1 B.C.A. ¶ 4,848 at 22,944; *Federal Pac. Elec. Co.,* IBCA No. 334, 1964 B.C.A. ¶ 4,494 at 21,585.

[18] Although the doctrine of the law of the case is not an inexorable command, it nevertheless "is waived for only the most cogent of reasons and to avoid manifest injustice." *Terrell* v. *Household Goods Carriers Bureau,* 494 F.2d 16, 19-20 (5th Cir.), *cert. denied* 419 U.S. 987 (1974). *See also* 1B *Moore's Federal Practice* ¶ 0.404 [1] at 405-06 (2d ed. 1974); (9 *Moore's Federal Practice* ¶ 110.25 [2] at 274-75 (2d ed. 1975)). Here, the doctrine was not waived for any cogent reason, but rather was ignored because of the Court's singular concentration on reducing the amount of the judgment due petitioner.

The Court of Claims' failure to look to the pertinent provisions of the Code in this case where there are no Federal precedents, statutes or regulations which would require a result contrary to the U.C.C. is inconsistent not only with its own prior decision in this case, but its view in cases prior and subsequent to this one and to the prevailing view of Federal courts, contract boards, and the Government generally as well. The considerable uncertainty with respect to the substantive law applicable to public contracts which has been caused by the Court of Claims' sudden departure from its established course must be promptly dispelled. This is particularly true because the Court of Claims occupies the lead role in the development of the law of Government contracts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Claims, judgment should be vacated, and the cause remanded to the Court of Claims with directions to comply with its Rule 147.

Respectfully submitted,

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